IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI

SECOND CIVIL APPEAL NO.59 OF 2001

1. Shri Sonu Verekar
(since deceased)
through his legal
representatives:

a). Shri Raju Verekar,
son,
b). Miss Surat Verekar,
daughter,
c). Miss Meera Verekar,
daughter,
d). Miss Vidya Verekar,
daughter,
e). Smt. Deepali Dangi,
daughter,
f). Shri Dattaraj Dangi,
son-in-law,
g). Smt. Sheetal Amonkar,
daughter,
h). Shri Damodar Amonkar,
son-in-law,

2. Smt. Manikbai Sonu Verekar,
aged 64 years,
All residents of Mapusa, Goa. ... Appellants.

versus

Shri Nishith M. Prabhu Verlekar,
businessman, Near Dena Bank,
Mapusa, Goa. ... Respondent.

Mr. M. S. Usgaonkar, Senior Advocate with Miss R. Sardessai, Advocate for the Appellants.

Mr. S. D. Lotlikar, Senior Advocate with Mr. A. D. Bhobe, Advocate for the Respondent.

CORAM: P. V. HARDAS, J.

DATED: 11TH MARCH, 2002.

ORAL ORDER

This Second Appeal has been filed against the Judgment and Decree of the District Judge, North Goa, Panaji, dated 4th August, 2001 in Regular Civil Appeal No.72 of 1994 confirming the Judgment and Decree dated 30th

July, 1994 in Special Civil Suit No.215/1985/A, passed by the Civil Judge, Senior Division, Mapusa, dismissing the suit. This Second Appeal has been filed by the Original Plaintiff who assails the concurrent finding of fact recorded by the two Courts below.

2. Whether the Respondents/Original Defendant was a tenant or a licensee? The two Courts below on the basis of the evidence adduced by the parties have recorded a finding that the Respondents/Original Defendant was a tenant inducted by the Appellants/Plaintiffs.

3. Mr. M. S. Usgaonkar, the learned Senior Advocate appearing for the Appellants/Original Plaintiffs has referred to Clause No.6 of the agreement at Exh.D1. As per Clause 6 of the said agreement, it was agreed between the parties that the Appellants/Original Plaintiffs shall fix the rent of shop No.4, i.e. the suit shop, and the rent shall be adjusted towards the 1/3rd amount collected by the second party. The learned Senior Advocate appearing for the Appellants then invited my attentioon to the written statement filed by the Defendant and particularly at para 10 of the written statement. In para 10 of the written statement, in reply to para 10 of the plaint, the Respondents/Original Defendant had stated that in the month of September, 1979, in view of his expansion of the business and in accordance with Clause No.5 of the

agreement, he chose to take on lease the shop no.4 for himself as no person was available to take on lease the shop no.4 on the condition which was stated in Clause No.5 of the agreement. It is further stated that the Respondents/Original Defendant, therefore, requested the Plaintiff No.1 to grant tenancy to the Defendant in respect of shop no.4 i.e. suit shop and fix the rent at Rs.150/- per month in accordance with Clause No.6 of the said agreement and possession thereof came to be delivered. The learned Senior Advocate appearing for the Appellants has, therefore, urged before me relying on a legal notice dated 23rd July, 1985 which is at Exh.P3 that the recitals in the said notice at paragraph 2 are contrary to the agreement. The said letter Exh.P3, dated 23rd July, 1985 at para 2 refers to Clause No.5 of the agreement and that one Shri Shankar Telang has been selected by the Original Defendant as a lessee of the suit shop. Para 2 further requests the Appellants/Original Plaintiffs to fix the monthly rent. It may incidentally be mentioned that this letter Exh.P3 dated 23rd July, 1985 had been sent by the Advocate appearing for the Respondent/Original Defendant after the institution of the suit. This letter has been sent as an offer of compromise without prejudice.

4. The learned Senior Advocate appearing for the Appellants has, therefore, urged that the evidence led by the Respondent/Original Defendant that he had been trying

to select a tenant and since the tenant was not available and due to the expansion of his business, he decided to take the suit shop on rent, according to the learned Senior Advocate appearing for the Appellants is contrary to the terms of the agreement Exh.D1 and this is contrary to Section 92 of the Indian Evidence Act and, therefore, the Courts below were in error in relying upon this evidence. According to the learned Senior Advocate appearing for the Appellants, the consideration of this evidence has vitiated the findings arrived at by the two Courts below.

5. The aforesaid question of law is the substantial question of law which is urged before me in support of the admission of the Second Appeal.

6. A perusal of paragraph 10 of the written statement would show that the Respondent/Original Defendant had stated that as no third party was available and due to the expansion of his business, he had decided to take the suit shop on rent thereby meaning that he had chosen himself as the lessee. It is true that the agreement does not contemplate a situation in the sense that the Respondent/Original Defendant would choose himself as a lessee for the shop. It does not altogether exclude such a possibility. Clause No.5 of the agreement refers that the Respondent/Original Defendant shall select any person as a lessee for the shop no.4 and he shall collect 1/3rd of the

total expenses incurred for the construction of the ground floor from the said person so selected towards the adjustment of the costs of the ground floor. Clause No.6 of the said agreement then empowers the Appellants/Original Plaintiffs to fix the rent and the rent so fixed would be adjusted towards the aforesaid 1/3rd amount collected by the Respondent/Original Defendant from the said lessee so selected by him. According to me, the evidence which has been led by the parties is not contrary at all to the terms of the agreement. Para 10 of the written statement of the Respondent/Original Defendant then reiterates that the Defendant had requested the Appellant No.1/Plaintiff No.1 to grant the tenancy to the Defendant in respect of the suit shop and accordingly, the Respondent/Original Defendant was inducted as a tenant at the rent of Rs.150/- per month. The Defendant has been in possession of the said suit shop since the year 1975 till 1985 when the suit came to be filed by the Appellants/Original Plaintiffs. The letter at Exh.P3 was issued by the Respondent/Original Defendant through his Advocate and this letter has been sent as an offer of compromise and was without any prejudice.

7. The learned appellate Court in para 11 of its Judgment has referred to this letter and has come to a conclusion that even if the contents of the letter are accepted, they do not remotely indicate that the

Respondent/Original Defendant was not a tenant of the Appellants/Original Plaintiffs.

8. Mr. S. D. Lotlikar, the learned Senior Advocate appearing for the Respondent/Original Defendant has vehemently urged before me that the two Courts below have recorded a finding that the Respondent/Original Defendant was a tenant. This finding has been recorded on the basis appreciating the evidence led by the Plaintiffs and the Defendant. According to the learned Senior Advocate appearing for the Respondent, there is no perversity in the reasoning of the two Courts below.

9. I have given my anxious consideration to the rival submissions advanced before me and according to me, this Second Appeal does not involve any substantial questions of law. The evidence which has been led by the parties is not contrary to the terms of the agreement and is not in breach of Section 92 of the Indian Evidence Act. In any event, the two Courts below have appreciated the evidence and have arrived at a finding that the Respondent/Original Defendant was a tenant and not a licensee. In view of the above, I see no merit in the Second Appeal and the same is dismissed with no order as to costs.

(P. V. HARDAS)